

NTSB Order No.
EM-36

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.,
on the 31st day of July 1974.

CHESTER R. BENDER, Commandant, United States Coast Guard

vs.

ARTHUR D. NEILSON Appellant,

Docket ME-41

ORDER DENYING PETITION FOR RECONSIDERATION

Counsel for the Commandant has filed a petition for reconsideration of Board Order No. EM-35, adopted June 5, 1974. In that action, we modified the Commandant's decision in Appeal No. 1908, by directing that the revocation of appellant's seaman's documents for misconduct while serving as a second steward aboard the SS SANTA MERCEDES, affirmed therein, be reduced to a suspension of the aforesaid documents. We further directed that the suspension period, which started retroactively on September 5, 1973, when appellant surrendered his merchant mariner's document (No. Z-706856), should terminate as of the service date of Order EM-35, on June 13, 1974.

The petition seeks reinstatement of the original revocation order imposed by the administrative law judge. The grounds being asserted attack the "apparent bases" for our modification of that sanction, and our findings with respect to the length of the suspension period. Counsel for appellant opposes the petition, arguing that reconsideration of the of the Board's order is not authorized by regulation or precedent urging that such order should be implemented.

Petitions for reconsideration are not provided for in the rules of procedure governing seaman's appeals to this Board from the decisions of the Commandant.¹ Nevertheless, by precedent, they

¹14 CFR 425.

are granted or denied in the Board's discretion.² In this instance, we find no issue presented by the Commandant's petition which was not considered in making our prior decision.

With respect to the petition's first ground, it is asserted that our modification action was based solely on factors in mitigation and a conclusion that appellant's offense of "sexual molestation was not serious." This is far from an accurate characterization and disregards our conclusion that the evidence of record failed to support the findings, which connoted that a physical form of molestation was committed by appellant. According to the findings which were sustained, appellant's offense consisted of spoken words alone.

Contrary to what has been asserted, we did find that the verbal molestation of appellant had been "particularly reprehensible" under the circumstances of the case. It was nonetheless of diminished gravity as contrasted to the findings for which revocation had theretofore been imposed. This and several other factors in mitigation were the real bases for the Board's decision to modify the sanction, with one Member dissenting therefrom. Accordingly, the first ground of the petition, founded on misconception, is rejected.

Secondly, it is asserted that in finding the length of the suspension period "sufficient for disciplinary and rehabilitative purposes," we have invaded the law judge's discretion and deviated from the Coast Guard's administrative clemency procedures.³ The procedures would authorize appellant to apply for a new document 3 years after the revocation order was imposed for his offense. They are wholly inapplicable now, since the Board has modified the order.

The claimed interference with the law judge's discretion is unspecified. In any event, we find that it also lacks validity in view of this Board's final reviewing authority in the administrative process here involved. It is our adjudicative role to make the ultimate determinations as to whether the law judge's findings of misconduct are adequately based on the record and warrant the sanction imposed by him. The Board remains of the view that the suspension of appellant's seaman's documents for a period slightly in excess of 9 months is a sanction commensurate with the nature of his offense and considering other factors in mitigation

²Commandant v. Reagan, 1 N.T.S.B. 2191 (1970); 2 Am. Jur. 2d Administrative Law § 537.

³46 CFR 137.13.

which reduce the likelihood of his repetition of such offenses during maritime employment.

ACCORDINGLY, IT IS ORDERED THAT:

1. The petition for reconsideration filed on behalf of the Commandant be and it hereby is denied.

McADAMS, THAYER, BURGESS, and HALEY, Members of the Board, concurred in the above order. REED, Chairman, was absent, not voting.

(SEAL)